LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 9 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1048

UNITED STATES OF AMERICA,

vs.

MURRAY FRIEDLANDER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

H. DAVID ROTHMAN,
Attorney for Petitioner.

1914 Frick Building,
Pittsburgh, Pennsylvania 15219.

BATAVIA TIMES, APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
5022 CARLYN DRIVE, PITTSBURGH, PA., 15236.
412-881-7463.

INDEX.

	PAGE
Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit	1
A. Opinions of the Courts Below	1
B. Grounds Upon Which the Jurisdiction of this Honorable Court is Invoked	2
C. Questions Presented for Review	2
D. Constitutional Provisions and Statutes Involved	3
E. Statement of the Case	3
1. The *Voir Dire*	4
2. The opening statement by the Assistant United States Attorney	5
3. The Evidence	5
4. The motion to strike certain evidence and for a judgment of acquittal	14
5. The request for instruction and the charge of the Court relative to the "Mr Murray" conversations	15
6. The Motion for a New Trial	16
F. Reasons in Support of Allowance of the Writ	16
1. This case presents a clear opportunity for the Court to currently pass upon the law applicable to actual and constructive possession of stolen merchandise as those concepts relate to the crucial issue of *knowledge*	16
2. The Court has not recently passed upon a case raising the issues considered in *Berger v. United States*, and the opening statement by the prosecution in the instant case calls for strict application of the principles enunciated by this Court	17

PAGE

3. This Court has not issued any clear guidelines relative to the admissibility of telephone calls to identify the caller where there is no ability to make a voice identification .. 18

4. Petitioner's admission that he knew the driver, Goodnight, violated his privilege against self-incrimination 19

Appendix:

Opinion of the Court 21

TABLE OF CASES.

Berger v. United States, 295 U. S. 78, 79 (1935) 17, 18
Miranda v. Arizona, 384 U. S. 436, 444-445 .....11, 15, 16, 19, 20
United States v. Casalinuovo, 350 F. 2d 207 (2nd Cir. 1965) 17
United States v. Russo, 123 F. 2d 420 (3rd Cir. 1941) .. 17

STATUTES.

U. S. Code 18 U. S. C. A. Sec. 659 ..... 1, 3
28 U. S. C. A., Sec. 1254(1) 2

UNITED STATES CONSTITUTION.

Fifth Amendment 3

IN THE

Supreme Court of the United States

No. .....

UNITED STATES OF AMERICA,

vs.

MURRAY FRIEDLANDER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

MURRAY FRIEDLANDER, by his attorney, H. DAVID ROTHMAN, ESQUIRE, a member of the Bar of this Honorable Court, respectfully represents as follows:

A. Opinions of the Courts Below

Petitioner was tried and convicted before the United States District Court for the Western District of Pennsylvania and a jury upon a two Count indictment charging violation of U. S. Code 18 U. S. C. A. Sec. 659. The first count charged that he knowingly possessed twelve tons of copper wire and eleven cartons of plastic electric insulators which had been stolen from an interstate shipment, knowing the same to have been stolen, on or about March 22,

1968. The second count charged the same offense and involved television sets, radio and high fidelity consoles on or about March 31, 1968.

The trial Court filed no written opinion in denying petitioner's post-verdict motions. Petitioner was sentenced on October 25, 1968 to a term of four years imprisonment.

The judgment of sentence was appealed to the United States Court of Appeals for the Third Circuit at No. 17,613. The conviction was affirmed on November 19, 1969 by the Opinion of the Circuit Court, a copy of which is appended hereto.

B. Grounds Upon Which the Jurisdiction of this Honorable Court is Invoked

The jurisdiction of the Court is invoked to review the judgment of the United States Court of Appeals for the Third Circuit entered November 19, 1969 affirming petitioner's conviction. On December 12, 1969, this Honorable Court, by Mr. Justice Brennan, upon petitioner's application, extended the time for filing this Petition for Writ of Certiorari to and including January 9, 1970.

The statutory provision upon which jurisdiction is conferred is as follows: Supreme Court Jurisdiction, 28 U. S. C. A., § 1254(1)—Courts of Appeal; Certiorari.

C. Questions Presented for Review

1. In the absence of proof of actual possession of recently stolen merchandise, were the circumstances surrounding petitioner's constructive possession sufficient to submit to the jury the issue of petitioner's knowledge that the goods were stolen?

2. Where the subject of the prosecution was the possession of two interstate shipments of goods, did the Assistant United States Attorney imply knowledge of offenses committed by petitioner beyond what was charged in the indictment when he argued in his opening statement that the Government would establish that petitioner was operating a *major station point* for the distribution and sale of stolen goods in Western Pennsylvania, thus depriving petitioner of a fair trial?

3. Was the circumstantial evidence surrounding petitioner's constructive possession of the subject goods sufficient to permit the jury to infer that the "Mr. Murray" who telephoned to inquire about the sale of the goods was in fact petitioner (*Murray* Friedlander) or someone calling on his behalf and with his knowledge, absent any voice identification?

4. Where petitioner was interrogated by Federal agents and advised of his rights, and where petitioner replied he would make no statement without the assistance of counsel, was his subsequent admission that he knew one Goodnight, the driver who delivered and sold part of a stolen shipment, the product of further interrogation in violation of petitioner's privilege against self incrimination?

D. Constitutional Provisions and Statutes Involved

Fifth Amendment to the Constitution of the United States, 18 U. S. C. A. Section 659.

E. Statement of the Case

Jurisdiction in the United States District Court for the Western District of Pennsylvania was founded upon a two count indictment charging violation of U. S. Code 18 U. S. C. A. § 659.

The defense offered no evidence and moved for a judgment of acquittal at the close of the Government's case (R. 390),[1] which motion was denied (R. 430). Petitioner filed a motion for a new trial on October 22, 1968, which motion was argued on October 25, 1968, and orally denied prior to the imposition of sentence which followed immediately. (There is a separate transcript of the proceedings on the motion for new trial argued October 25, 1968, consisting of 16 pages). This motion was argued without the benefit of a trial transcript.

1. The *Voir Dire.*

In the course of selecting a jury in the trial of these two indictments, prospective juror No. 12 indicated that he had some knowledge of the facts of the case and that a person whom he knew expressed "an off-hand opinion" as to the guilt or innocence of Mr Friedlander (R. 11). The prospective juror indicated that he was told by his acquaintance what he understood the facts to be. Upon further inquiry, this juror indicated that if he thought what was told him was true he would feel that it would naturally follow that the petitioner might be guilty (R. 12-13). Defense counsel not only challenged, for cause, which was sustained, but he moved that the entire panel be discharged and the case continued (R. 13). The Court denied the request for a mistrial (R.13).

Prospective juror No. 17 indicated that he was a truck driver and that he had driven for Interstate Truck Service, which was interlined with the Herriott Trucking Company, the trucking company from whom the goods in these cases were stolen ( ). This prospective juror, upon inquiry

[1] References are to the pages in the original trial transcript which was not required to be printed in the Circuit Court and which is being submitted with this Petition.

from the Court, indicated that his employment and association would be the source of an opinion in a case of this character, and he added that if he were the petitioner, he would not want to be judged by a juror who was of his own frame of mind (R. 21-22). The Court excused the juror from service and defense counsel again moved for dismissal of the entire panel and for a continuance of the case. That request was denied (R. 21-22).

2. The opening statement by the Assistant United States Attorney.

In outlining the Government's case, the Assistant United States Attorney asserted as follows:

> "We will establish beyond any doubt that the defendant was, in fact, at the Davis Warehouse in Sharpsburg operating a major station point for the distribution of and selling point of stolen goods in the Western Pennsylvania area" (R. 48).

In response to this remark, counsel for petitioner moved for the removal of a juror, which request was denied (R. 48-49).

3. The Evidence.

There was no material dispute upon the issues of whether the goods were stolen and there was, also, no dispute that the evidence established that goods in question found their way to what was purportedly called the W. H. Davis Company Inc. warehouse in the Borough of Sharpsburg, Allegheny County, Pennsylvania. Various marking tags and seals found in a trash barrel in the warehouse were identified as having come from the stolen shipment of copper wire and insulation, evidencing that the shipment had been in the warehouse. A substantial portion of the shipment of television sets was found in the warehouse by

the Federal Bureau of Investigation. In the Court below (R. 406-408), in arguing the motion for judgment of acquittal, counsel for petitioner conceded that the evidence established that the goods had, in fact, been in the warehouse.

The issues at trial, therefore, were petitioner's alleged possession, custody and control of the goods and his knowledge that they were stolen.

Freehold Real Estate Company in Pittsburgh was the agent for leasing the warehouse in question, which was owned by persons named Zambrano (R. 176-177).

Late in 1967 or early in 1968, contact was made by the agent with Mr. Lawrence Berlin and the terms of the lease for the subject warehouse were negotiated with Mr. Berlin for $475.00 per month for a period of 63 months commencing February 1, 1968 (R. 181-182). The lease was Government's Exhibit No. 27 (R. 183). The lease bore the signatures of the Zambranos, Mr. Berlin and, on the left-hand side in the witness portion of the lease, there was a signature of one "Fred Land" (R. 186).

Mr. Berlin testified that he and petitioner in the latter part of 1967 discussed opening a warehouse for selling furniture wholesale (R. 209). Mr. Berlin was to manage the operation because of his knowledge of the furniture business and petitioner was to supply the finances (R. 209-210). The name "Davis Warehouse Inc." was selected for use by petitioner and Mr. Berlin. Mr. Berlin identified his signature on Exhibit No. 27, the lease, and he also testified that petitioner signed the name "Fred Land" where it appeared on the witness portion of the lease (R. 212). Petitioner also gave Mr. Berlin $100.00 for the gas bill for the premises and directed that the billing by the

gas company he sent to David Warehouse Inc. Petitioner also advised that a pay phone be installed in the warehouse (R. 213-214). Mr. Berlin identified petitioner's check of $15.00 to the Bell Telephone Company (Exhibit No. 29) (R. 214).

Government's Exhibit No. 28 was a check drawn on the Commercial Bank and Trust Company of Pittsburgh; petitioner Murray Friedlander was the payor and the payee was Mr. Berlin. The check was for $950.00, dated January 22, 1968. It was endorsed by Mr. Berlin and made payable to the Davis Warehouse Inc. (R. 198). Mr. Berlin testified that the initial check of $950.00 for the rent was endorsed over to the owner so that Mr. Berlin would not have to deposit the check in his account which might have been subject to attachment because of his poor financial status (R. 215-216).

Government's Exhibit No. 29 was also a check by the petitioner to the Bell Telephone Company for $15.00, dated February 21, 1968, which check was identified by Mr. Berlin (R. 214). The check for $950.00 was for the first and last months of the lease; a check for the March rent in the amount of $475.00 was returned to the bank marked refused because of insufficient funds (R. 187-188). Mr. Berlin testified that he and Mr. Friedlander, in early February, 1968, went to the owners, obtained the keys to the warehouse and that he turned them over to Mr. Friedlander (R. 216-217). Mr. Berlin added that he was at the warehouse on two subsequent occasions and that petitioner was there on both of them (R. 217-218). Mr. Berlin testified that he knew that petitioner owned and operated a business known as Foreign Car Parts (R. 235).

Kingsley Evarts testified that he was the manager of J. & M. Hydraulic Service which sold hydraulic equipment

to Foreign Car Parts at 1301 Penn Avenue in 1965 (R. 247); he indicated that a Monarch Dyn-a-jack was sold to Foreign Car Parts in 1965 (R. 249) bearing Serial No. 2161 (R. 172).

Eric Pirchesky, a scrap dealer in the business known as Riverside Iron and Steel Corporation, Monongahela, Pennsylvania, testified that on March 21 and March 22, 1968, he purchased a large quantity of copper wire (R. 250-251). He testified that he got a call from a "Mr. Murray" (R. 251-252) indicating that he had eight to ten tons of No. 1 copper available for sale. Mr. Pirchesky gave Murray the price of 55¢ a pound and two deliveries of copper were made on March 22; one truck load arrived at 11:00 A. M. and a second arrived at 2:00 P. M. The witness was suspicious and called the State Police (R. 254). The first truck was an Avis rented truck and the license number was obtained and given to the State Police. A direction was given by the men in the truck to make the check for the copper payable to Diamond Industries (R. 255). The Government's Exhibit No. 30 was that check (R. 256). The driver in the second truck also wanted a check made payable to Diamond Industries, but he left without being paid for the copper (R. 258).

Later that day, two more calls were received from "Mr. Murray". The first call was an inquiry as to why payment had been stopped on the check. (Mr. Pirchesky testified that he issued a stop payment order); a second call was simply an inquiry as to whether or not everything was all right (R. 258-259). The Government's Exhibit No. 35 was a bill of sale from Diamond Industries of McKees Rocks, Pennsylvania and covered the first load of copper and was signed by "Don Deltonda". It was brought to the scrap yard by the first driver who had returned for the

purpose of delivering the bill of sale. At that point, the drivers were arrested by the State Police, who were waiting at the yard (R. 260-261).

A motion to strike the testimony relating to the conversations with "Mr. Murray" was denied (R. 261-262). Defense counsel also requested that the Court admonish the jury that the evidence was not substantive evidence as to the identity of the caller. The Court denied the request without prejudice to counsel (R. 262-263). The Government's Exhibit No. 30 was a check dated March 22, 1968, in the amount of $7,015.80 drawn by Riverside Iron & Steel Corporation and signed by Eric Pirchesky (R. 200). The check was made payable to Diamond Industries and was endorsed by Diamond Industries and signed by "Don Deltonda" (R. 201). Mr. Friedlander presented that check to be cashed on March 22, 1968. In the process of attempting to cash the check, the bank was notified of the stop payment order. Mr. Friedlander was upset and indicated that he was going to see about the matter (R. 201).

The United States called state trooper Clair Sunderland, who was called in to investigate the sale of the copper wire at Monongahela, Pennsylvania (R. 264-265). He indicated that a Mr. Goodnight identified himself as the person who had delivered the copper but that he used the name James Turner (R. 269). Mr. Goodnight, himself, was called by the Government to identify Government's Exhibit No. 36, which was a specimen of his own handwriting (R. 284).

Sunderland added that he talked with "Mr. Murray" after Pirchesky had spoken with him (R. 269, 271). Sunderland indicated that "Murray" wanted to know why he could not be paid for the copper. He indicated that Mr. Murray did not give him the source of the copper in re-

sponse to his inquiry, and that he talked to him for approximately five minutes (R. 272), but he could not identify his voice if he heard it again (R. 273). A similar motion to strike the officer's testimony relative to the conversations with Mr. Murray was refused (R. 275).

Mr. Pirchesky was recalled to testify as to the exact license number which he gave the State Police (R. 277). He had examined a State Police report which refreshed his recollection as to the number which was V-3034A (R. 277-278).

Harry B. Davis (no connection with the Davis Warehouse Inc. involved in this case) testified that he was in the business of selling machinery and equipment in February, 1968 (R. 285) and, at that time, he discussed with Mr. Friedlander a purchase of a pneumatic 4,000 pound forklift. This piece of equipment was, in fact, sold to Mr. Friedlander (R. 288), and that he also purchased two fire extinguishers (R. 288), and that Mr. Friedlander guaranteed the payment for these items although the invoices were made to the Davis Warehouse Inc. (R. 290). The Government's Exhibit No. 39 was a delivery ticket made up at the time the forklift and the fire extinguishers were delivered to the warehouse on February 15, 1968 (R. 293). None of Mr. Davis' negotiations for the equipment involved Mr. Berlin (R. 294-295).

Mr. Edward Fincik, an employee of Harry Davis (R. 298) testified that he delivered the forklift and the fire extinguishers to the warehouse in Sharpsburg and identified Murray Friedlander as being on the premises (R. 299-302).

Leo J. Klingensmith, a representative of Avis Truck Rental at 350 Poplar Street, Borough of Etna, Allegheny

County, Pennsylvania, testified to a truck rental agreement, Exhibits Nos. 41 and 42 and to an instruction slip, Exhibit No. 43. Exhibit No. 41 was the rental agreement for a truck bearing license plate V-3034A rented at 11:30 A. M. March 21, 1968, bearing the name of Murray Friedlander as having rented the vehicle. The document also bore the signature of the person renting the truck (R. 314-320).

Carl R. Kovalcik testified that he was the station manager for Avis and indicated that Friedlander had called the day before the truck was picked up and that he in fact did pick up the truck. He indicated that Friedlander signed the rental agreement in his presence (R. 324).

Petitioner was arrested on August 9, 1968 (R. 151). Samples of his handwriting were furnished by him (R. 151) (Government Exhibit No. 20)-(R. 307-308) (Government Exhibit No. 40). Prior to that time, on June 3, 1968, petitioner was interviewed by the Federal Bureau of Investigation, at which time, he was considered a suspect in the investigation (R. 153-155). Petitioner was advised of his rights under the historic *Miranda* decision (R. 149). Then the witness, Federal Bureau of Investigation Agent Schneider was questioned as follows (R. 149-150):

> Q. Did you question him with regard to the Davis Warehouse?
>
> A. He said he didn't want to tell us anything without having his lawyer present, but he would go so far as to say that he had been interested in the Davis Warehouse, in leasing it, and was in the process of leasing it at the time a search was made and the TV sets were recovered.
>
> Q. Did he say who he was in the process of leasing it from?
>
> A. He said he wanted to lease it from or sublet it from Lawrence Berlin.

Q. Did he say anything else about Mr. Berlin?

A. Only that Berlin was the lessor of the warehouse.

Q. Did he say anything about knowing an individual by the name of Goodnight?

A. We asked him if he knew an individual by the name of James or Jimmie Goodnight. He said that he did know such an individual, that he had bought some structural steel from Jimmie Goodnight, and that Jimmie Goodnight at one time helped him move some of his furniture.

On re-direct examination, the following occurred (R. 162-163):

By Mr. Bingler:

Q. Agent Schneider, you testified that Mr. Friedlander stated as soon as you informed him of your purpose, that he didn't want to say anything without his lawyer present and, then, you continued to testify. You went on to testify to things he did say about the Davis Warehouse.

Could you relate the circumstances under which the conversation came up about the Davis Warehouse? Specifically, did you continue to interrogate him after he had advised you that he didn't want to say anything without his lawyer being present?

A. When we arrived at the house, we told him we were there to talk to him about some thefts from interstate shipments and, then, we advised him as to the rights that I described yesterday. Then after we advised him of his rights, he said "Well, more specifically, what are you here on," and we stated that we were there in connection with some copper, some television sets that were found in the Davis Warehouse and we wanted to know what connection he had with the Davis Warehouse.

He then replied that he didn't want to say anything about the copper and the television sets without his lawyer present, but that he would state that the lease for the Davis Warehouse was signed by Larry Berlin and that he had been in the process of attempting to lease the warehouse from Berlin, and this response was not—it was not a response to a direct question.

other than what he had asked what we were there about. We did not continue to interrogate him—

Q. I'm not sure that the Jury can hear you. Would you speak up, please?

A. Yes, sir.

We did not continue to interrogate him about the case.

S. Warren Marshal was called by the Government as an expert witness to testify to handwriting. He expressed the opinion that the "Fred Land" signature on Government's Exhibit No. 27, the lease, was written by Murray Friedlander (R. 356). He testified also that the handwriting on Government's Exhibit No. 31, which was the pick-up slip from Harry B. Davis relating to the delivery of equipment was not written by Lawrence Berlin (R. 359). Exhibit No. 45 was identified as a sample of Lawrence Berlin's handwriting (R. 336-337). Over objection, Marshal was allowed to testify to his "probable opinion" that the writing on Government's Exhibit No. 31, the pick-up slip, was prepared by Murray Friedlander. He indicated he could only express a probable opinion because of the limited amount of comparable known handwriting available (R. 372-373). Mr. Marshal, over the objection that there was not sufficient evidence to link witness Goodnight (the truck driver) with the petitioner, was permitted to express the opinion that the endorsement "Don Deltonda" on Government's Exhibit No. 30 (a check for approximately $7,000.00) and the signature on Government's Exhibit No. 35, "Don Deltonda" (the bill of sale from Diamond Industries) were written by James Goodnight (R. 383).

Samples of the copper wire delivered to the scrap yard in Monongahela, Pennsylvania on March 22 were forwarded for examination to the Packard Electric Company in Warren, Ohio, the source of the stolen copper (R. 304-305).

Mr. Lowell Curtis Link, quality control supervisor, Packard Electric Division, General Motors Corporation at Warren, Ohio testified that he obtained the eleven strands of wire which has been forwarded for examination and proceeded to make an analysis of the wire. He was directed to determine if it was the wire which had been involved in the interstate shipment in question. He conducted the analysis partly by himself and partly at his direction (R. 327-328). Mr. Link testified that he compared measurements of the eleven strands of wire sent to him with the Packard products involved in the interstate shipment. He indicated that the dimensions of the eleven strands of copper wire compared with the specifications for copper of the parts involved in the shipment (R. 334). The eleven wires were also analyzed with a spectrometer. He indicated that the chemical composition of the coating on the eleven wires were similar to the specifications for the chemical compositions on the five part numbers involved (R. 335). He added that each of the eleven strands of wire submitted for analysis had the same dimensional characteristics and the same chemical composition of the coating of one of the five types of copper wire involved in the subject shipment (R. 335).

4. The motion to strike certain evidence and for a judgment of acquittal.

After the Government rested its case (R. 390), petitioner's counsel moved to strike evidence and for judgment of acquittal. First, he moved to strike the testimony of Mr. Link as having no probative value because Mr. Link was not asked to form an opinion as to whether or not the wire which was delivered to the scrap yard in Monongahela, Pennsylvania was the wire that was stolen from Packard Electric Division (R. 395).

Secondly, he moved to strike the testimony of Agent Schneider relative to the interview with the petitioner and statements made by him after he was given the *Miranda* warnings (R. 396-397).

He moved to strike the testimony of Eric Pirchesky and Trooper Sunderland relating to the use of their testimony to establish the identity of the petitioner in connection with the telephone conversations of the unidentified "Mr. Murray" (R. 398-399). The motions to strike were denied (R. 404).

At that point, counsel for petitioner argued for the motion for judgment of acquittal (R. 404-405), to which the Government argued in opposition. The motion for judgment of acquittal was denied (R. 430).

5. The request for instruction and the charge of the Court relative to the "Mr. Murray" conversations.

Petitioner's counsel requested the following instruction to the Jury (Instruction No. 15):

> The government presented two witnesses, namely, Erie Perchesky [*sic*] of Riverside Iron and Steel Company, and State Police Officer Clair Sunderland, who both testified as to telephone conversations with a male voice who identified himself as a "Mr. Murray."
>
> You are instructed not to consider in any manner, in your deliberations, any of the testimony of either of the witnesses of the related telephone conversations, particularly, the name "Mr. Murray"; and you are not to draw any inferences from that testimony.

The Court's instruction to the Jury on this issue appears as follows (R. 446-447):

> Before you can consider against the defendant the telephone conversation of the man who identified as "Mr. Murray", you must find by independent evidence; that is by evidence other than those telephone

conversations, that the man who identified himself as "Mr. Murray" was either the defendant, Murray Friedlander, or an agent or confederate of the defendant who was engaged with him in an effort to sell the copper wire delivered to the scrapyard.

6. The Motion for a New Trial.

As indicated above, the motion for a new trial was filed on October 22, 1968. Then, on Friday, October 25, 1968, counsel for petitioner asked that the motion for new trial be disposed of without the benefit of transcript of testimony because the trial judge, the Honorable John W. Delehant, a visiting judge, would not be sitting. (Transcript of October 25, 1968, page 3.) At that time, counsel for petitioner raised the question of *voir dire* examination above referred to. Counsel raised the issue of the interview with petitioner after he had been given his *Miranda* warning. Next, counsel raised the issue of the "Mr. Murray" telephone conversations with the witnesses Pirchesky and Sunderland and, in the same connection, counsel argued the refusal to charge as requested as well as the refusal to admonish the Jury at the time the testimony relative to the telephone conversations was introduced. After argument by the Government, the motions for a new trial and the motion for "Summary Acquital" were denied. The appeal to the Circuit Court followed.

F. Reasons in Support of Allowance of the Writ

1. This case presents a clear opportunity for the Court to currently pass upon the law applicable to actual and constructive possession of stolen merchandise as those concepts relate to the crucial issue of *knowledge*.

Petitioner has always urged that the United States never proved more than constructive possession of the goods in

question and that there was not sufficient evidence from which actual possession could be inferred. Without evidence of *actual, unexplained* possession of recently stolen merchandise, there must be, in addition, circumstances from which a jury could infer knowledge, *United States v. Russo*, 123 F. 2d 420 (3rd Cir. 1941); *United States v. Casalinuovo*, 350 F. 2d 207 (2nd Cir. 1965).

The leasing of the warehouse and the leasing of the truck did not prove actual possesion of the goods in petitioner. Other evidence of his knowledge that the goods were stolen was required. It is respectfully submitted that the circumstances attending his constructive possession were not inconsistent with innocense and there was, therefore, insufficient evidence to submit to the jury.

Courts and juries constantly grapple with a defendant's state of mind when guilty knowledge is the crucial issue in a criminal prosecution. The instant proceeding is a good example of the confusion which prevails in defining issues which relate to knowledge, particularly where the concepts of actual and constructive possession are involved. Guidelines from this Court would be most helpful because prosecutions for receipt of stolen interstate shipments are frequent.

2. The Court has not recently passed upon a case raising the issues considered in *Berger v. United States*, and the opening statement by the prosecution in the instant case calls for strict application of the principles enunciated by this Court.

Even conceding that the prosecution did not intentionally attempt to convey to the jury that petitioner was in the business of buying and selling stolen merchandise on a large scale, the clear, unequivocal impression created by the opening statement was that the two shipments involved in the prosecution were but part of the activities of petitioner

in operating a major distribution point for stolen merchandise. The prosecutor's statement created the impression that he had personal knowledge that there was more involved than the two shipments at issue. Even if they were substantial in themselves, this fact alone did not properly call for the observation that petitioner was operating a *major station point*. *Berger v. United States*, 295 U. S. 78, 79 (1935) has been violated.

Part of this picture, too, is the examination of the prospective juror who indicated, without being specific, that if the information he knew were true, then he would have to feel petitioner was guilty. The jury, after hearing that exchange, then heard the opening statement by the prosecuting attorney.

Petitioner's trial began, then, in a hostile atmosphere which never was corrected. None of this can fairly be regarded as other than prejudicial, because it is the kind of atmosphere that tips the scales in favor of the prosecution, particularly where the evidence is circumstantial, as in the case at bar.

3. This Court has not issued any clear guidelines relative to the admissibility of telephone calls to identify the caller where there is no ability to make a voice identification.

Perhaps the most damaging evidence against petitioner was the "Mr. Murray" telephone calls; if the jury believed he called or that he authorized someone to call for him, then use of the semi-disguise in the name was the best evidence of guilty knowledge which was offered. The issue of knowledge was still very much undetermined, because petitoner used his own name to lease the truck and attempted to cash the check for the goods at a bank where he was personally known.

Goodnight, the driver, might well have prompted such a telephone call, knowing that the truck had been leased by Murray Friedlander. Such a call certainly would have protected any other person involved with Goodnight; receipt of such evidence as proof of the identity of the caller is certainly a risky business.

This is not to say that the identity of a caller can never be established except by voice identification. But the circumstances must clearly point to the identity of one person without the chance of a fraud being committed before a court should allow a jury to pass upon the issue. The general instruction given by the trial judge to the jury offered no strict guideline to them, and did not caution them against the possibility of fraud.

Without some guideline, the jury would very likely be guided by erroneous assumptions and inferences. Without some guideline, and it is submitted that none was provided, petitioner was denied due process of law. This Honorable Court should determine the standards and guidelines in this situation for the benefit of this petitioner and future litigants.

4. Petitioner's admission that he knew the driver, Goodnight, violated his privilege against self-incrimination.

It is clear from this record, and the Government seemed to concede this point in its brief before the Circuit Court, that petitioner's admission relative to knowing Goodnight came after further interrogation, despite petitioner's indicating he wanted the assistance of counsel. Petitioner raises no point about those statements which were clearly volunteered and not the product of further questioning.

Miranda v. Arizona, 384 U. S. 436, 444-445, does not preclude the possibility that interrogation of a suspect in his

own living room is not *custodial;* such interrogation is not lacking in coercive qualities. But custodial or not, *Miranda* indicates questioning should cease after a suspect indicates he wants counsel, unless a statement is freely and intelligently volunteered. If that is not the clear meaning of *Miranda,* then this Honorable Court should clarify the issue.

Respectfully submitted,

H. DAVID ROTHMAN,
Attorney at Law,
1914 Frick Building,
Pittsburgh, Pennsylvania 15219.
412-391-5520

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17613

UNITED STATES OF AMERICA
v.
MURRAY FRIEDLANDER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 23, 1969

Before KALODNER, STALEY AND FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed November 19, 1969)

PER CURIAM.

Appellant Murray Friedlander was convicted on two counts of violating 18 U.S.C. § 659, possession of goods stolen from interstate commerce. Count one involved possession of approximately twelve tons of copper wire and a quantity of electrical insulators which had been unlawfully removed from a truck en route from Warren, Ohio, to

Rochester, New York. The second count involved possession of television sets, radios, and high fidelity consoles similarly taken from interstate commerce. Appellant was sentenced to four years on each count, sentences to run concurrently.

We have carefully considered each of the contentions of the appellant, and we find that they are totally without merit.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 10 1970
JOHN F. DAVIS, CLERK

No. 1048

In the Supreme Court of the United States

OCTOBER TERM, 1969

MURRAY FRIEDLANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1048

MURRAY FRIEDLANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on two counts charging him with knowing possession of property (twelve tons of copper wire, television sets, radios, and high fidelity consoles) which had been stolen from interstate commerce, in violation of 18 U.S.C. 659. He was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. 21-22).

376-288—70

Petitioner raises here precisely the same contentions which the court below rejected as "totally without merit" (Pet. App. 22). He argues that the evidence showing his possession of the recently stolen property was insufficient to support the common law inference of knowledge that the property was stolen;* that there was prejudicial error resulting from the opening remarks of the prosecutor; that evidence was improperly received concerning telephone conversations regarding the stolen merchandise because of the witness' inability to identify the other party's voice; and that a statement of petitioner to FBI agents was inadmissible under *Miranda* v. *Arizona,* 384 U.S. 436.

As to certain of these contentions, the facts adduced in the petition itself establish their insubstantiality. For example, the claim that there was further interrogation of petitioner after he had been given the warnings required by *Miranda* v. *Arizona,* 384 U.S. 436, and after he stated he would not answer any questions until he spoke to his attorney, is refuted by the testimony quoted in the petition (see Pet. 11–13). As this testimony indicates, there was no further interrogation after the warning; petitioner's comments introduced at trial were volunteered and not in response to any questioning.

---

*The claim is based on the assertion that the only kind of possession proved was constructive rather than actual. Even assuming *arguendo* that this was the case, such possession sufficiently supports an inference of knowledge that the property was stolen. *United States* v. *DeSisto,* 329 F. 2d 929, 935 (C.A. 2), certiorari denied, 377 U.S. 979.

As for the claim that government counsel made prejudicial remarks in his opening argument (Pet. 5, 17–18), petitioner overlooks the fact that the court shortly thereafter specifically admonished the jury that opening statements are not evidence and should not be considered as such by the jury. The remaining claims similarly do not warrant further review by this Court.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

[1] All of petitioner's contentions are comprehensively discussed in the government's brief in the court of appeals, a copy of which we are filing herewith.

U.S. GOVERNMENT PRINTING OFFICE : 1970